BEFORE THE SECRETARY OF STATE
STATE OF COLORADO

CASE NO. OS 2004-001

AGENCY DECISION

IN THE MATTER OF THE COMPLAINT FILED BY CHARLES H. BUCKNAM REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY DOUGLAS COUNTY COMMISSIONER JIM SULLIVAN, COMMITTEE TO ELECT JIM SULLIVAN, STATE HOUSE DISTRICT 45 CANDIDATE JAMES SULLIVAN, BRADBURY PROPERTIES, INC., CAPITAL SOLUTIONS CONSULTING, INC., CASTLE ROCK BANK, GRIMSHAW AND HARRING, P.C., INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION, LAND TITLE GUARANTEE COMPANY, NATURAL BALANCE, INC., PLAN WEST, INC., RAY S. WELLS CORP., and EDW.C. LEVY CO.

This matter is before the Administrative Law Judge on the complaint of Charles H. Bucknam (Bucknam) against numerous respondents. The complaint was filed with the Colorado Secretary of State on February 9, 2004. The Secretary of State referred the complaint to the Division of Administrative Hearings on February 12, 2004, as required by Colo. Const. art. XXVIII, sec. 9(2)(a). The complaint alleges that the Respondents violated certain provisions of Article 28 of the Colorado Constitution and the Fair Campaign Practices Act, Section 1-45-101 *et seq.*, C.R.S. (2003) (the FCPA), as well as the Secretary of State's Rules Concerning Campaign and Political Finance, 8 CCR 1505-6.

The hearing on this complaint was conducted on April 13, 2004 before Deputy Chief Administrative Law Judge Marshall A. Snider. The hearing was digitally recorded in Courtroom A from 9:00 a.m. to 4:00 p.m.

Bucknam was present at the hearing and was represented by Jerri L. Hill, Esq. Respondents Jim Sullivan (Sullivan) and Committee to Elect Jim Sullivan (the Committee) were represented by Charles E. Norton, Esq. Respondent Intermountain Rural Electric Association was represented by Patrick B. Mooney, Esq. Respondents Land Title Guarantee Co. (Land Title), Ray S. Wells Corp. and Plan West, Inc. (Plan West) were represented by James C. Hackstaff, Esq. and Scott E. Gessler, Esq. Respondent Natural Balance, Inc. (Natural Balance) was represented by Scott D. Kumpf, Esq. Respondent Grimshaw and Harring, P.C. was represented by James M. Hunsaker, Esq. and Ronald Fano, Esq. Respondent Bradbury Properties, Inc. was represented by Mark G. Grueskin, Esq. Respondent Edw. C. Levy Co. was represented by Wayne F. Forman, Esq. and Adam T. DeVoe, Esq. Respondent Castle Rock Bank

was represented by Darrell J. Gubbels, Esq. Respondent Capitol Solutions Consulting, Inc. was not present or represented at the hearing.

The record of the hearing was held open until May 5, 2004 for the submission of written closing arguments, at which time this matter was ready for the issuance of an Agency Decision. The Administrative Law Judge issues this Agency Decision pursuant to Colo. Const. art. XXVIII, sec. 9(1)(f), (2)(a) and Section 24-4-105(14)(a), C.R.S. (2003).

PRELIMINARY MATTERS

1. At or before the hearing Bucknam entered into stipulations with respondents Castle Rock Bank, Bradbury Properties, Inc. and Edw. C. Levy Co. Pursuant to these stipulations the cases against these three respondents were dismissed with prejudice.

2. During the hearing Bucknam entered into a stipulation with Respondent Intermountain Rural Electric Association. Pursuant to that stipulation the case against Respondent Intermountain Rural Electric Association was dismissed with prejudice. In addition, Bucknam withdrew all claims against Sullivan and the Committee related to a contribution by Intermountain Rural Electric Association.

3. At the start of the hearing Bucknam's Motion to Amend Complaint was granted.

4. At the start of the hearing the Motion to File Pre-Hearing Brief filed by Respondents Land Title, Ray S. Wells Corp. and Plan West was granted.

5. At the hearing Bucknam withdrew paragraph 20 of the complaint that asserted a violation of Colo. Const. art. XXVIII, sec. 3(6) related to allegations that Sullivan had accepted a $2,000 contribution for campaign brochures.

6. The complaint named as a separate party "State House District 45 Candidate James Sullivan". This named party is not a person different than respondent Jim Sullivan and is not an organization. The designation of State House District 45 Candidate James Sullivan as a party is therefore stricken.

7. After the hearing Bucknam moved to dismiss respondent Capital Solutions Consulting, Inc. All claims against Capital Solutions Consulting, Inc., and all claims against Sullivan and the Committee related to a contribution by Capital Solutions Consulting, Inc. have been dismissed with prejudice.

FINDINGS OF FACT

1. Sullivan is a county commissioner in Douglas County, Colorado. Sullivan was first elected county commissioner in 1988.

2. Douglas County, Colorado, is not a home rule county.

3. The Committee is a candidate committee that was organized to receive contributions and make expenditures under Sullivan's authority as a candidate for Douglas County commissioner. The Committee remained open in the fall of 2003.

4. Sullivan was subject to term limits in 2003 and for this reason was not able to run again for county commissioner in 2004. In the summer of 2003 some citizens of Douglas County organized the placement of an issue on the ballot that would have eliminated term limits for Douglas County commissioners. If the term limit ballot issue had passed Sullivan would have been able to run for county commissioner in 2004.

Contributions to the Committee in Fall, 2003

5. In late September, 2003 certain individuals in Douglas County organized a fundraising event to raise money to support the term limit ballot issue. Funds raised at this event or contributed to the Committee at a later time were placed into the Committee's bank account. These funds were not used to support Sullivan's candidacy for county commissioner because, at the time of the event, Sullivan was unable to run for another term as commissioner. Instead, these funds were used to support the term limit ballot issue.

6. On September 29, 2003 Ray S. Wells Corp. made a $250 contribution to the Committee.

7. On October 1, 2003 Plan West made 4 contributions to the Committee totaling $1,000.

8. On October 1, 2003 Land Title made a $1,000 contribution to the Committee.

9. On October 30, 2003 Natural Balance made a $500 contribution to the Committee.

10. At the time of the fundraiser Sullivan believed that the Committee could lawfully accept contributions from corporations. Although Sullivan inquired of various officials about how to comply with other aspects of the campaign finance laws, he did not do so with regard to the legality of the corporate contributions.

11. Had the term limit ballot issue succeeded Sullivan planned to run for county commissioner in 2004. In that event Sullivan would have used any funds left in the Committee's bank account to promote his county commissioner candidacy.

12. The term limit ballot issue was defeated in the November, 2003 election. Sullivan was therefore unable to run for Douglas County commissioner in 2004.

13. Sullivan then considered running for state representative in House District 45. On November 26, 2003 he filed the paperwork necessary to become a candidate for that office. However, Sullivan never formed a candidate committee for a House District 45 race, did not accept any campaign contributions after November 26, 2003, and never established a bank account for a House District 45 campaign.

14. Sullivan investigated whether he could lawfully transfer funds from the Committee to an eventual House District 45 campaign. He determined that the law was uncertain that he could do so. He never transferred any funds from the Committee for use in a House District 45 campaign.

15. By January 20, 2004 Sullivan had decided not to run for the House District 45 seat in the Colorado House of Representatives. On January 20 the Committee issued checks to return contributions to some donors, including Plan West. As of the date of the hearing in this case the Committee had spent the balance in its bank account down to zero by donating some of the funds to charities and returning the rest to contributors. The Committee did not return the contributions made by Land Title, Ray S. Wells Corp. or Natural Balance to those contributors.

Corporate Contribution Rules and Opinions

16. In November, 2002 the Colorado Constitution was amended to add Article 28, titled Campaign and Political Finance. On January 13, 2003 Colorado Attorney General Ken Salazar issued a Formal Opinion of the Attorney General on several questions related to Article 28 and the FCPA (the AGO). This opinion addressed the question of whether Article 28 and the FCPA applied to home rule cities and counties. The opinion specifically dealt with the issue of whether the prohibition against contributions by corporations and labor organizations to candidate committees in Section 3(4)(a) of Article 28 applied to candidates for election in home rule municipalities and counties.

17. The AGO concluded that Article 28 did not supplant the authority of home rule cities and counties to regulate campaign finance. The AGO stated that "Article XXVIII does not apply to home rule counties and municipalities which have charters or ordinances that already address the matters covered in Article XXVIII". The AGO also concluded that Article 28 did not impose limits on contributions to candidate committees by corporations and labor organizations in elections in home rule "or other local entities". The AGO added in this regard that "the prohibition in section 3(4)(a) of Article

XXVIII, limiting corporate or labor organization contributions, does not apply to candidates for local offices".[1]

18. During 2003 many people involved in political campaigns believed that Article 28 did not prohibit corporate or labor organization contributions to a candidate committee in a local government election, regardless of whether the local government entity was a home rule city or county. The Committee's treasure, Ken Ash, held this belief.

19. Before making the October 1 contribution to the Committee Diane Evans, vice president and operations manager for Land Title in Douglas and Elbert Counties, Colorado, believed that it was legal for Land Title to make a contribution to the Committee. Evans was aware that others in the business community also believed that corporate contributions to local candidate races were lawful under Article 28. Evans asked her company's lobbyist if such a contribution was lawful and the lobbyist told her it was. Evans did not consult a lawyer regarding the legality of a contribution to a local campaign.

20. Land Title presented no evidence that Evans or anyone else on behalf of Land Title was aware of or relied upon the rules of the Secretary of State on campaign finance, was aware of or relied upon the AGO, spoke to anyone in the Secretary of State's office regarding the legality of corporate contributions to local candidates, or reviewed the Secretary of State's web site in this regard. The Administrative Law Judge therefore finds that Land Title did not rely on any of these sources when it made its contribution.

21. Evans was aware that if the term limit ballot issue passed Sullivan would have been able to run for county commissioner in 2004.

22. Bill Howard, president of Plan West, was also under the impression that corporate contributions to local candidate races were lawful under Article 28. Howard received legal advice to that effect from his attorney. In addition, campaign officials for various candidates advised Howard that these contributions were proper under Article 28. Howard did not review the Secretary of State's rules or web site regarding the legality of these contributions.

23. Howard was aware that if the term limit ballot issue passed Sullivan might run for county commissioner in 2004.

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1. Respondents Land Title, Ray S. Wells Corp. and Plan West assert in argument that the Secretary of State distributed the AGO in her campaign education materials and on the Secretary of State's web site. Respondents presented no evidence that the Secretary of State distributed or posted the AGO, or when this distribution or posting was made (if at all), or that any respondent saw these materials as distributed or posted by the Secretary of State.

24. Plan West presented no evidence that Howard or anyone else on behalf of Plan West was aware of or relied upon the rules of the Secretary of State on campaign finance, was aware of or relied upon the AGO, spoke to anyone in the Secretary of State's office regarding the legality of corporate contributions to local candidates, or reviewed the Secretary of State's web site in this regard. The Administrative Law Judge therefore finds that Plan West did not rely on any of these sources when it made its contribution.

25. Scott Kumpf, general counsel and corporate secretary for Natural Balance, also was under the impression that corporate contributions to local candidate election races were proper under Article 28. Kumpf was not aware of the Secretary of State's rules regarding these contributions.

26. Natural Balance presented no evidence that Kumpf or anyone else on behalf of Natural Balance was aware of or relied upon the rules of the Secretary of State on campaign finance, was aware of or relied upon the AGO, spoke to anyone in the Secretary of State's office regarding the legality of corporate contributions to local candidates, or reviewed the Secretary of State's web site in this regard. The Administrative Law Judge therefore finds that Natural Balance did not rely on any of these sources when it made its contribution.

27. Ray S. Wells Corp. presented no evidence that it was aware of or relied upon the rules of the Secretary of State on campaign finance, was aware of or relied upon the AGO, spoke to anyone in the Secretary of State's office regarding the legality of corporate contributions to local candidates, or reviewed the Secretary of State's web site in this regard. The Administrative Law Judge therefore finds that Ray S. Wells Corp. did not rely on any of these sources when it made its contribution.

28. Land Title, Plan West and Ray S. Wells Corp. presented the testimony of Jeffrey Vigil, who has been active in several political campaigns in Colorado. Vigil testified that he once called the office of the Secretary of State and was advised in a telephone conversation with an unnamed person in that office that Article 28 did not govern school board races. There was no evidence that Vigil discussed this conversation with any respondent in the present case, and the Administrative Law Judge finds that Vigil did not discuss this conversation with any respondent.

29. Effective April 21, 2003 Colorado Secretary of State Donetta Davidson issued temporary rules concerning Article 28 and the FCPA. Rule 27.2 of these temporary rules provided as follows:

> The provisions of section 3(4) of article XXVIII of the state constitution relating to contributions and expenditures of corporations and labor unions apply to elections to every state and local public office, except local public offices in home rule counties or home rule municipalities that have

adopted charters, ordinances, or resolutions that address any of the matters covered by article XXVIII or article 45.

30. Davidson made Rule 27.2 permanent effective July 21, 2003.

31. On October 28, 2003 Davidson wrote a letter to counsel for Land Title, Ray S. Wells Corp. and Plan West. This letter was in response to an inquiry from the attorney asking whether corporations and labor organizations could contribute to local school board candidates. Counsel's letter recognized that Rule 27.2 reflected the view that Section 3(4) of Article 28 applied to elections in local governments that were not home rule entities.

32. Davidson's October 28, 2003 letter advised counsel that under Section 3(4) of Article 28, and Secretary of State Rule 27.2, corporations and labor organizations could not contribute to candidates in any local election, except in home rule cities and counties. Secretary Davidson noted in this letter that Rule 27.2 conflicted with the AGO. Davidson agreed with the AGO that Article 28 did not apply to home rule counties and municipalities that have charters or ordinances that address campaign finance. However, she disagreed with the statement in the AGO that "the prohibition in section 3(4)(a) of Article XXVIII, limiting corporate or labor organization contributions, does not apply to candidates for local offices".

33. The Administrative Law Judge finds on the basis of all of the evidence, including the conflicting opinions of government officials, that with regard to the contributions in question in this case the Committee, Sullivan, Land Title, Plan West, Ray S. Wells Corp. and Natural Balance acted in a good faith belief that corporate contributions were allowable in local races.

The Kron Letter

34. After the term limit ballot issue failed Sullivan asked Tom Grimshaw, a lawyer and personal friend for 25 years, if Sullivan could apply the funds in the Committee's bank account to a possible race for House District 45. Grimshaw was of counsel to the law firm of Grimshaw and Harring.

35. Grimshaw asked Norman F. Kron, a director and shareholder at Grimshaw and Harring, to respond to Sullivan's question. Kron was a friend of Sullivan's for the prior 10 years. No evidence was presented as to whether Kron had any official functions or duties for Sullivan or the Committee.

36. On December 15, 2003 Kron wrote a letter to Sullivan on Grimshaw and Harring letterhead responding to this inquiry. Kron's secretary, a Grimshaw and Harring employee, typed this letter. Kron's secretary types personal correspondence for Kron and Kron uses firm letterhead for personal correspondence.

37. Kron considered the work he did for Sullivan in answering this question to be free legal work, volunteered to help a friend. Kron did not open a firm file or assign a client number to this matter. Kron did not propose Sullivan as a new client to the firm's directors, seek their permission to take Sullivan on as a client, or check on possible conflicts with other firm clients. The firm did not prepare an engagement or fee letter. Kron did not keep track of billing time for this matter and did not consider it billable work. Grimshaw and Harring did not send Sullivan a bill for this legal advice. Sullivan did not pay Grimshaw, Kron or Grimshaw and Harring for their services. Kron did not submit the December 15 letter for the firm review process that is usually conducted before the firm issues formal opinions. The Administrative Law Judge therefore finds that Kron gave this advice to Sullivan not as a client of the firm, but as free legal advice provided by Kron individually.

38. The time Kron spent working on his legal advice to Sullivan was time he might otherwise have spent on billable work on behalf of Grimshaw and Harring.

39. Sullivan did not consider the letter from Kron to be a contribution under Article 28 or the FCPA. The Committee did not report Kron's work as a contribution in reports filed with the Secretary of State.

Additional Facts

40. On January 8, 2004 the Committee wrote two checks to Sullivan. One of the checks, in the amount of $650, was to reimburse Sullivan for campaign expenditures incurred in 1998. The second check, for $1,500, was to reimburse Sullivan for campaign expenditures incurred in 1999.

41. On November 10, 2003 the Committee filed a report of itemized contributions for contributions of $20 or more. Four entries in this report failed to include the occupation and employer of the contributor in the space provided on the form for that information. The four contributors whose occupation and employer were not listed, and the amounts of their contributions, were: T. Timothy Kershisnik ($250); Timothy E. Roberts ($250); Paul Masovero ($500); and Bob Brooks ($250).

42. The Committee did not disclose the occupations and employers of these individuals because it did not have this information. There was no evidence that the Committee made any attempt to determine this information.

DISCUSSION

Corporate Contributions to the Committee

1. Colo. Const. art. XXVIII, sec. 3(4)(a) states: "It shall be unlawful for a corporation or a labor organization to make contributions to a candidate committee . . .". A candidate is defined as any person who seeks election to any state *or local public*

office. Colo. Const. art. XXVIII, sec. 2(2). Candidates for election to local public offices and their committees are therefore subject to Article 28 by the express language of that constitutional amendment. Colo. Const. art. XXVIII, sec. 2(2), (3). The Committee was formed for Sullivan's county commissioner campaigns and was thus a committee as defined by Article 28. *Id.* Ray S. Wells Corp., Plan West, Land Title and Natural Balance do not contest that they are corporations as defined in the FCPA or the rules of the Secretary of State. Each of these respondents made a contribution to the Committee. Findings of Fact, Paragraphs 6-9. Therefore, these respondents were corporations that made contributions to a candidate committee in violation of the plain language of the constitutional prohibition in Section 3(4) of Article 28.[2]

In addition to this constitutional provision, Secretary of State Rule 27.2, 8 CCR 1505-6, made clear that the prohibition against corporate contributions in Article 28, Section 3(4) applied to local elections, except local elections in home rule cities and counties. A rule of the Secretary of State is presumptively valid. *Colorado Ground Water Commission v. Eagle Peak Farms, Ltd.,* 919 P.2d 212, 217 (Colo. 1996). In addition, the construction of this constitutional provision by the Secretary of State, the official responsible for the administration of the campaign finance laws, is entitled to great weight. *See Janssen v. Industrial Claim Appeals Office,* 40 P.3d 1 (Colo. App. 2001); *Mile High Greyhound Park, Inc. v. Colorado Racing Commission,* 12 P.3d 351 (Colo. App. 2000).

Therefore, despite the contrary opinion of the Attorney General, on April 21, 2003 the Secretary of State, the official charged with enforcement of Article 28, Section 3(4), clarified that this measure prohibited corporate contributions to candidate committees in local races in non-home rule government entities. The Administrative Law Judge is not entitled to ignore the plain language of the constitutional provision or the Secretary of State's equally plain and consistent regulation adopted in April, 2003.

The Administrative Law Judge therefore concludes that Ray S. Wells Corp., Plan West, Land Title and Natural Balance violated Colo. Const. art. XXVIII, sec. 3(4)(a).

2. Ray S. Wells Corp., Plan West and Land Title argue that the Committee was not a "candidate committee" within the meaning of the constitutional prohibition because Sullivan was not a "candidate" for office at the time of the contributions in question (Sullivan could not run for county commissioner at that time due to term limits, and he had not announced a candidacy for any other office). Nevertheless, a person remains a "candidate", as defined in the constitution, as long as his candidate committee exists. Colo. Const. art. XXVIII, sec. 2(2). The Committee remained open, had a bank account, and accepted contributions through the fall of 2003. Therefore, Sullivan remained a candidate as that term is defined in Section 2 of Article 28, and the

2. When the language of a constitutional provision is plain and the meaning is clear, it should be interpreted and applied as written. *People v. Johnson,* 77 P.3d 845 (Colo.App. 2003).

Committee remained a candidate committee to which corporations were prohibited from contributing.

3. Land Title, Ray S. Wells Corp. and Plan West also argue that they acted in good faith, but that a lack of clarity existed as to whether corporate contributions were permitted in local elections. In support of this argument they point to the conflict between the opinions of the Attorney General and the Secretary of State. Regardless of these conflicting opinions, by April 21, 2003 (when Rule 27.2 was promulgated) the public was put on notice that contributions such as these were prohibited. There is no requirement in Article 28, Section 3(4) or in Rule 27.2 that a violation must be willful, knowing or intentional.

Further, even if there was confusion in some quarters regarding whether corporate contributions were permitted in local races, Ray S. Wells Corp., Plan West, Land Title and Natural Balance did not rely on the AGO or Secretary of State's rules or opinions when they made the contributions at issue in this case. Findings of Fact, Paragraphs 20, 24, 26 and 27. Although there was evidence that someone at the Secretary of State's office provided incorrect advice on this issue to at least one person, that advice was not communicated to any of these respondents. Findings of Fact, Paragraph 28.

These respondents also claim that the matter of whether corporate contributions to local races were permissible was not clarified until the Secretary of State's October 28, 2003 letter, which was issued after they made their contributions. However, as noted above these respondents did not rely on any of the available government materials. In any event, the legal requirements were clearly established by the time Rule 27.2 was adopted on April 21 and those requirements were required to be followed from that point on.

4. Natural Balance argues that the constitutional prohibition is only against making contributions that expressly advocate the election or defeat of a candidate. The language in Article 28, Section 3(4) of the constitution cited by Natural Balance provides only that corporations can not "make expenditures expressly advocating the election or defeat of a candidate . . ." That provision applies only to expenditures; the issue in the present case is contributions, not expenditures.

5. The corporate respondents also argue that they substantially complied with the constitution. The Colorado Supreme Court has held that a substantial compliance test is the appropriate means of analysis for determining compliance with statutory procedures regulating the right to vote, or the exercise of the right of initiative or referendum. Strict compliance is not required in those cases. Thus, the court has ruled that substantial compliance with the statute regulating the content of write-in ballots cast for a candidate is sufficient to validate the ballots, so as to not unreasonably burden the right to vote. *Meyer v. Lamm*, 846 P.2d 862, 874-77 (Colo. 1993). Similarly, because the rights of initiative and referendum are fundamental rights under the

Colorado Constitution, the sufficiency of an initiative petition should be determined on the basis of substantial compliance. *Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996); *Loonan v. Woodley*, 882 P.2d 1380, 1383-84 (Colo. 1994). A liberal construction to these laws is mandated so that the fundamental right to vote may be facilitated, not hampered by technical provisions that are unnecessary to fairly guard against fraud and mistake. *Loonan v. Woodley*, *supra* at 1384, citing *Montero v. Meyer*, 795 P.2d 242, 245 (Colo. 1990); *see also Fabec v. Beck, supra* at 341.

There is no case law holding that contribution limits rise to the same level as the fundamental rights of citizens to vote or initiate new laws. Therefore, cases such as *Meyer v. Lamm*, *supra,* and *Loonan v. Woodley, supra,* do not mandate a substantial compliance analysis in the present case. In addition, the purpose of Article 28 of the constitution is in part to prevent corruption and the appearance of corruption that are created by large campaign contributions and by corporate contributions made to influence elections. Colo. Const. art. XXVIII, sec. 1. In the area of corporate contributions this purpose cannot be achieved by allowing less than full compliance with the constitutional prohibition against such contributions. Accordingly, the Administrative Law Judge concludes that a substantial compliance test is not applicable in this case.

Even if a substantial compliance test were warranted in this case, the corporate respondents did not substantially comply with the prohibition against corporate contributions. In the context of complying with laws regulating elections and initiatives, substantial compliance is measured by the following considerations: (1) the extent of the non-compliance; (2) whether the purpose of the law is substantially achieved despite the non-compliance; and (3) whether a good faith effort has been made to comply with the law (as opposed to an intent to mislead the electorate). *Bickel v. City of Boulder*, 885 P.2d 215, 227 (Colo. 1994); *Loonan v. Woodley*, *supra* at 1384. The extent of the non-compliance here was total. Respondents did not comply with the law at all; they made prohibited contributions to a candidate committee without reservation or limitation on use of the funds.

Ray S. Wells Corp., Plan West, Land Title and Natural Balance assert that their non-compliance was minimal because their contributions were not intended to promote Sullivan's election (because he was term-limited). They state instead that their contributions were made to support the term limit ballot issue and, except in the case of Plan West, were then contributed to charity. Nevertheless, the constitutional prohibition is that corporations cannot "make contributions to a candidate committee". Colo. Const. art. XXVIII, sec. 3(4)(a). The Committee was a candidate committee as defined in Colo. Const. art. XXVIII, sec. 2(3). These corporations therefore made contributions to a candidate committee, which is prohibited by Article 28, Section 3(4)(a). Nothing in that constitutional prohibition states that a corporation may make a contribution to a candidate committee as long as the committee spends the money on something other than the candidate's election. Perhaps, as these respondents argue, corporate contributions would be lawful if made to an issue committee formed to support the term limit ballot issue. However, the contributions were not made to an issue committee,

they were made to a candidate committee. Regardless of how the money is spent, the plain language of the constitution prohibits a corporate contribution to a candidate committee.[3]

Nor has the purpose of the law been substantially achieved. The purpose of the law was to prevent corporations from contributing money to candidate committees, and those prohibited contributions were made. The corporate respondents argue that the purpose of Section 3(4) was achieved because that provision was designed to prevent corporate money from going to a candidate's election war chest and here the money went to the ballot issue or charitable causes. As noted above, however, the prohibition is against contributions to a candidate committee, regardless of how the money is used. In any event, the passage of the ballot issue was a necessary precondition to Sullivan's becoming a candidate for county commissioner. But for the fortuitous failure of the ballot issue, the corporate contributions would most likely have gone to Sullivan's' next county commissioner campaign.

Substantial compliance requires a failed attempt to comply with the law. Here, although the corporate respondents may in good faith have misapprehended the law, they nonetheless wholly failed to comply with it. The Administrative Law Judge concludes that even if a substantial compliance test were applicable, these respondents did not substantially comply with the prohibition against corporate contributions to candidate committees.

The Committee's Acceptance of Corporate Contributions

1. Bucknam seeks to penalize Sullivan and the Committee for accepting the corporate contributions. Colo. Const. art. XXVIII, sec. 3(4)(a) prohibits corporations from making contributions to a candidate committee. There is no explicit, parallel prohibition against a committee *accepting* contributions from a corporation. Section 3(4)(a) of Article 28 contains various limitations on contributions to political and candidate committees and political parties. With the exception of subsection 4, subsections 1 through 6 all explicitly state that committees and political parties cannot *accept* certain contributions. For example, Sections 3(1) and (2) state that no person or small donor committee shall contribute "and no candidate committee shall accept" contributions in excess of certain amounts. Subsections 3, 5 and 6 of Section 3 also prohibit or limit the *acceptance* of certain contributions by political parties, political committees or candidate committees. Significantly, while Section 3(4)(a) prohibits contributions by corporations to a candidate committee, that subsection does not prohibit a candidate committee from accepting contributions from corporations.

3. Had the term limit ballot issue passed, Sullivan would have run for county commissioner again and contributions to the Committee would have been used to support that candidacy. Contributions to the Committee could also have been used to retire prior campaign debts, if any. Therefore, even if the Administrative Law Judge accepted respondents' argument that the contributions must relate to a candidate election, the contributions at issue in this case could easily have been used for that purpose.

In interpreting the state constitution courts first look at the language of a constitutional provision and if possible apply the provision according to its clear terms. *Havens v. Board of County Commissioners*, 58 P.3d 1165 (Colo.App. 2002). Words and phrases are to be given their ordinary, commonly understood meaning. *In Re Interrogatories on H.B. 99-1325,* 979 P.2d 549, 554 (Colo. 1999); *People v. Johnson*, 77 P.3d 845 (Colo.App. 2003). When the language of the provision is plain and the meaning is clear, it should be interpreted and applied as written. *People v. Johnson, supra*. However, if the language contained in a citizen-initiated measure is ambiguous, a court may ascertain the intent of the voters by considering other relevant materials. *In Re Interrogatories on H.B. 99-1325, supra.*

When related provisions of a law use different terms a presumption exists that the intent of the drafters was to give the provisions different meanings. *Hall v. Walter*, 969 P.2d 224, 231 (Colo. 1998).[4] The fact that the drafters of Section 3 of Article 28 specifically prohibited acceptance of unlawful contributions by committees in some provisions, but did not do so in the subsection dealing with corporate contributions, reflects an intent that acceptance of corporate contributions is not prohibited by Section 3.

2. In addition, Colo. Const. art. XXVIII, sec. 10(1) provides for a civil penalty for violations of Article 28's provisions relating to contribution limits. This section constitutes a penal provision because it creates a new and distinct cause of action and requires no proof of actual damages as a condition precedent to recovery. *See Palmer v. A.H. Robins Co*., 684 P.2d 187, 214 (Colo. 1984); *Todd Holding Co. v. Super Valu Stores*, *Inc*., 874 P.2d 402 (Colo. App. 1993). Penal provisions should be strictly construed. *Harrah v. People*, 243 P.2d 1035 (Colo. 1952); *see People v. District Court*, 713 P.2d 918 (Colo. 1986).

Section 3 of Article 28 explicitly prohibits candidate committees and others from accepting certain identified types of contributions. However, that section does not prohibit the acceptance of unlawful corporate contributions. Strictly construing Section 3, therefore, there is no explicit prohibition against Sullivan or the Committee accepting these contributions. The Administrative Law Judge cannot impose substantial penalties on Sullivan and the Committee for taking an action that is not prohibited by Section 3. It might make sense that if a contribution to a candidate committee is unlawful the acceptance of that contribution by a committee is also unlawful. However, Section 3 simply does not contain that prohibition. The Administrative Law Judge cannot read a non-existent provision into the constitution and then penalize parties for violating that provision merely because it might be logical for that provision to exist.

4. Rules of statutory construction may be applied when interpreting citizen-initiated constitutional measures. *Bickel v. City of Boulder*, 885 P.2d 215, 228 n.10 (Colo. 1994).

3. Accordingly, neither Sullivan nor the Committee violated the express provisions of Colo. Const. art. XXVIII, sec. 3(4)(a) when the Committee accepted the corporate contributions.

Return of the Corporate Contributions

Secretary of State Rule 4.10, 8 CCR 1505-6, as amended on January 6, 2004 states that contributions received in excess of contribution limits shall be returned to the contributor within 30 days. The prior rule (Rule 24.9) adopted on July 21, 2003 set a 10-day limit for the return of contributions in excess of the contribution limits. The prohibition against corporate contributions amounts to a contribution limit; that limit is "zero".[5] As concluded above, Colo. Const. art. XXVIII, sec. 3 does not prohibit a committee from accepting unlawful corporate contributions, such that a committee can be penalized for accepting the contribution under Article 28, Section 10(1). Nevertheless, the Secretary of State by this rule has required that a committee return unlawful contributions by corporations. Sullivan and the Committee did not do so within 30 days, in violation of Rule 4.10 and its predecessor Rule 24.9.

The Kron Letter as a "Contribution"

Bucknam alleges that respondent Grimshaw and Harring made an unlawful corporate contribution when it provided Kron's December 15, 2003 letter to Sullivan, and that Sullivan and the Committee failed to report this contribution. A "contribution" is defined in Article 28 to include anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's retention or election. Colo. Const. art. XXVIII, sec. 2(5)(a)(IV). A "contribution" does not include services provided without compensation by individuals volunteering their time on behalf of a candidate or candidate committee. Colo. Const. art. XXVIII, sec. 2(5)(b).

Grimshaw and Harring agree that Kron's time is a "thing of value" under section 2(5)(a)(IV). However, that firm argues that the letter was given to Sullivan to give advice on compliance with the campaign finance laws, and was not provided for the purpose of promoting Sullivan's election. Accordingly, Grimshaw and Harring argue that the letter should not be considered a contribution. However, Kron's letter may have had the effect of helping Sullivan in an eventual candidacy for House District 45; if Sullivan could transfer campaign funds held by the Committee to the House District 45 race, Sullivan would have funds on hand that he could apply to that campaign.

Nevertheless, the evidence did not demonstrate that Grimshaw and Harring, as an entity, had any purpose to promote a candidacy of Sullivan's. Rather, the evidence established that Kron wrote this letter on behalf of Kron and Grimshaw as friends of Sullivan's. Grimshaw and Harring, as an entity, did not provide any legal advice to

5. Although not dispositive of the issue, it is instructive that Colo. Const. art. XXVIII, sec. 3, including the prohibition against corporate contributions to candidate committees, is titled "Contribution Limits".

Sullivan. Rather, the Administrative Law Judge has found that Kron personally gave Sullivan free legal advice. (Findings of Fact, Paragraph 37).

Grimshaw and Harring, as an entity, did not engage in any of the activities expected of a law firm in providing legal advice. Findings of Fact, Paragraph 37. The only evidence connecting Kron's legal advice to Grimshaw and Harring as an entity was that Kron's secretary typed the letter on firm letterhead, and that Kron's time could have been used to perform billable work for the firm. The preparation of the letter on firm letterhead is not persuasive evidence that this letter was a firm matter; Kron used firm letterhead and his secretary's services to prepare other personal correspondence as well.

Similarly, the fact that the time Kron spent on this legal advice to Sullivan was time he might otherwise have spent on billable work on behalf of Grimshaw and Harring does not mean that Grimshaw and Harring contributed this letter. As found above, Kron did this work personally. In addition, lawyers in a firm do not spend 24 hours a day doing firm work. Not everything they do that is legally oriented is the work of the firm. Volunteer legal advice to a person who is not a firm client falls into the category of work done on the lawyer's own time.

Kron's letter to Sullivan was not prepared for the purpose of Grimshaw and Harring, as an entity, promoting Sullivan's candidacy. Rather, it constituted services provided without compensation by Kron as a volunteer. Bucknam argues that Kron was not a volunteer under the FCPA because Section 1-45-112.5(1)(a) of the FCPA provides that to be immune from liability for a civil penalty under Article 28 a volunteer must act within the scope of the volunteer's official duties and functions for a candidate or candidate committee. Bucknam asserts that Kron had no official duties or functions for Sullivan or the Committee, and therefore could not be a volunteer under FCPA Section 112.5.

No evidence was presented as to whether Kron had any official functions or duties for Sullivan or the Committee (Findings of Fact, Paragraph 35). Even if Kron did not have any official functions with Sullivan or the Committee, Section 112.5(1)(a) does not prevent him from being considered a volunteer. The only requirements to be a volunteer under Const. art. XXVIII, sec. 2(5)(b) are that a person be an individual who volunteers his time to provide services without compensation. Kron met these requirements. Section 1-45-112.5(1)(a) merely identifies a sub-set of volunteers who are immune from penalties. That section does not purport to limit the definition of the term "volunteer" in Section 2(5)(b) of Article 28 to only those individuals who have official duties with a candidate or committee.

Therefore, Kron's services did not constitute a contribution by Grimshaw and Harring. Colo. Const. art. XXVIII, sec. 2(5)(a)(IV), (2)(5)(b). Because these services are not considered a "contribution" by Grimshaw and Harring, that firm did not make an

unlawful corporate contribution. In addition, Sullivan and the Committee did not fail to report a contribution as required by Section 1-45-108(1)(a)(I), C.R.S. (2003).

The Committee's Reimbursements to Sullivan

Secretary of State Rule 4.8, 8 CCR 1505-6, provides that any expenditure reimbursed to a candidate by the candidate's committee must be reimbursed within the same reporting period in which the expenditure was made. On January 8, 2004 the Committee reimbursed Sullivan for expenditures made in 1998 and 1999 (Findings of Fact, Paragraph 40). If Rule 4.8 applied to these reimbursements the Committee would be in violation of the rule.

Sullivan states in his closing argument that Rule 4.8 was not adopted until July 21, 2003. If that were the case Sullivan would not have violated the rule; he could not have complied with the rule in 1998 and 1999 if that rule did not exist at these times. In his responsive written arguments Bucknam does not contest Sullivan's assertion that this rule was not adopted until July, 2003.

Colo. Const. art. XXVIII, sec. 9(1)(f) provides that this hearing is conducted in accordance with the Colorado Administrative Procedure Act, Section 24-4-105, C.R.S. Under that statute the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. Bucknam is the proponent of an order that a civil penalty be assessed against Sullivan for this violation. Accordingly, Bucknam has the burden of proof. Neither party presented evidence on the history of Rule 4.8, and the parties did not ask the Administrative Law Judge to take administrative notice of the date of adoption. There is thus no evidence in the record to support a conclusion that Rule 4.8 or a similar rule was in existence in 1998 or 1999. Accordingly, Bucknam has failed to meet his burden of proof that Sullivan violated Rule 4.8 as to reimbursement for 1998 and 1999 expenditures.

Reporting of Occupations and Employers

Candidate committees are required to report the occupation and employer of every person who has made a contribution of $100 or more. Colo. Const. art. XXVIII, sec. 7; Section 1-45-108(1)(a)(II), C.R.S. (2003). In its November 10, 2003 report the Committee failed to include the occupation and employer of four individuals who contributed $100 or more. Findings of Fact, Paragraph 41.

In their written closing argument Sullivan and the Committee assert that they will file an amended report. Doing so does not change the fact that the Committee has failed to comply with this requirement since November, 2003.

Sullivan and the Committee also argue that they substantially complied with the requirement that the occupation and employer of persons who contributed more than $100 be reported. Assuming that the substantial compliance test is appropriate in a

case involving reporting violations, Sullivan and the Committee did not substantially comply with this requirement.[6] As noted above on page 11 of this Agency Decision, substantial compliance is measured by the following considerations: (1) the extent of the non-compliance; (2) whether the purpose of the law is substantially achieved despite the non-compliance; and (3) whether a good faith effort has been made to comply with the law (as opposed to an intent to mislead the electorate). *Bickel v. City of Boulder*, *supra* at 227; *Loonan v. Woodley*, *supra* at 1384.

The extent of the non-compliance here was total. The Committee wholly failed to disclose the required occupations and employers. In addition, the purpose of the law was not substantially achieved. The purpose of this requirement is to make available to the public the occupation and employer of contributors of $100 or more. That purpose was not accomplished in this case. Finally, the Committee did not establish that it made a good faith effort at compliance; there was no evidence that the Committee made any attempt to determine this information (Findings of Fact, Paragraph 42).

The Administrative Law Judge therefore concludes that the Committee violated Colo. Const. art. XXVIII, sec. 7 and Section 1-45-108(1)(a)(II), C.R.S. (2003) because its November 10, 2003 report failed to disclose the occupation and employer of four individuals who contributed $100 or more to the Committee.

Termination of the Committee

Bucknam alleges in his complaint that Sullivan and the Committee unlawfully failed to terminate the Committee when Sullivan announced as a candidate for House District 45. The complaint alleges that this conduct violated Colo. Const. art. XXVIII, sec. 2(3). That constitutional provision states that a candidate can have only one candidate committee. Sullivan did not violate Section 2(3). He never formed a candidate committee for the House District 45 race. Accordingly, he did not have more than one candidate committee.

Bucknam argues for the first time in his written closing argument that Sullivan violated Secretary of State Rule 3.2. That rule provides that *a candidate committee* that changes elective office sought shall terminate the existing committee and register a new committee no later than 5 days after the change. The rule refers to the actions of a candidate committee, not a candidate. Under Colo. Const. art. XXVIII, sec. 2(3) a candidate committee is a committee that receives contributions on behalf of a candidate, and a candidate can have only one committee open at a time for this purpose. Reading the rule along with this constitutional provision, if a candidate committee accepts contributions for a candidate who is seeking a new office, that

6. The Administrative Law Judge has previously held that a substantial compliance test applies to the reporting requirements of the FCPA. *In The Matter of the Complaint Filed by Mac Williams Regarding Alleged Violations of the Fair Campaign Practices Act on the part of Mesa County Citizens For Representative Government*, Case No. OS 2002-23 (March 27, 2003).

committee must immediately terminate and a new committee must be registered for the new office.

In the present case, even though Sullivan filed an announcement to run for the state house seat he took no action to open a bank account and accept contributions for that race. There was thus no need under the rule and constitutional provision to open a new committee and terminate the old one. In fact, the Committee was required to remain open until it had a zero balance in its account (Rule 3.3), which did not occur until well after Sullivan had announced for the state house seat.

The Administrative Law Judge therefore concludes that neither Sullivan nor the Committee violated Colo. Const. art. XXVIII, sec. 2(3) or the rules of the Secretary of State when they did not terminate the Committee within 5 days of Sullivan's announcement of his candidacy for the House District 45 seat.

Additional Arguments

In his post-hearing written arguments Bucknam makes additional arguments that were not contained in the allegations of the complaint. Because Respondents had no prior notice of these claims those arguments will not be considered.

CONCLUSIONS OF LAW

1. Ray S. Wells Corp., Plan West, Land Title and Natural Balance each violated Colo. Const. art. XXVIII, sec. 3(4)(a) when they made contributions to the Committee in a local race in a non-home rule county.

2. Sullivan and the Committee did not violate Colo. Const. art. XXVIII, sec. 3(4)(a) when the Committee accepted corporate contributions.

3. Sullivan and the Committee violated Secretary of State Rule 4.10, 8 CCR 1505-6, when they failed to return corporate contributions within 30 days.

4. Grimshaw and Harring did not make an unlawful corporate contribution in violation of Colo. Const. art. XXVIII, sec. 3(4)(a).

5. Sullivan and the Committee were not required to report a contribution from Grimshaw and Harring. Sullivan and the Committee did not violate Section 1-45-108(1)(a)(I), C.R.S. (2003) when it did not report a contribution from Grimshaw and Harring.

6. Bucknam has failed to meet his burden of proof that Sullivan violated Rule 4.8 as to reimbursement for 1998 and 1999 expenditures.

7. The Committee violated Colo. Const. art. XXVIII, sec. 7 and Section 1-45-108(1)(a)(II), C.R.S. (2003) because its November 10, 2003 report failed to disclose the occupation and employer of four individuals who contributed $100 or more.

8. Sullivan and the Committee did not violate Colo. Const. art. XXVIII, sec. 2(3) or the rules of the Secretary of State when they did not terminate the Committee within 5 days of Sullivan's announcement of his candidacy for the House District 45 seat.

AGENCY DECISION

1. The issues in a hearing conducted by an administrative law judge under Article 28 of the Colorado Constitution are limited to whether any person has violated Sections 3 through 7 or 9(1)(e) of Article 28, or Sections 1-45-108, 114, 115 or 117, C.R.S. Colo. Const. art. XXVIII, sec. 9(2)(a). If an administrative law judge determines that a violation of one of these provisions has occurred the administrative law judge's decision must include the "appropriate order, sanction or relief *authorized by [article 28]*" (emphasis supplied). Colo. Const. art. XXVIII, sec. 9(2)(a). Accordingly, any order issued by the Administrative Law Judge in this case must relate to a violation of one of the identified constitutional or statutory provisions, and any sanction must be authorized by Article 28 of the Constitution.

2. The Administrative Law Judge has found that Sullivan and the Committee violated Secretary of State Rule 4.10, 8 CCR 1505-6, when they failed to return unlawful corporate contributions within 30 days of receipt. There is no provision in Article 28, in the FCPA or in the rules of the Secretary of State authorizing any sanction to be imposed by an administrative law judge for a violation of a rule of the Secretary of State. The Administrative Law Judge's authority is limited to that set forth in Article 28, Section (9)(2)(a), which is to hear complaints and issue sanctions only for violations of the identified portions of the constitution and statute.[7] Accordingly, the Administrative Law Judge has no authority to issue a penalty or other sanction against Sullivan and the Committee for this rule violation.

3. Colo. Const. art. XXVIII, sec. 10(1) provides that any person who violates a provision of Article 28 relating to contribution limits shall be subject to a civil penalty of at least double and up to 5 times the amount contributed in violation of Article 28. Respondents Ray S. Wells Corp., Plan West, Land Title and Natural Balance made contributions in violation of the contribution limit in Colo. Const. art. XXVIII, sec. 3(4)(a). A civil penalty of at least double the amount of the contribution is mandatory under Article 28, Section 10(1). The Administrative Law Judge does not have the discretion to issue a lesser sanction. The Administrative Law Judge has found, however, that these Respondents acted in a good faith, though mistaken, belief that their contributions were

7. Even the Secretary of State's own rules provide for enforcement actions only for violations of Article 28 or the FCPA, not the rules. Rule 6.1, 8 CCR 1505-6.

lawful. Accordingly, the Administrative Law Judge concludes that the minimum allowable penalty of twice the amount of the contribution is appropriate. The Administrative Law Judge therefore orders that the following respondents pay a civil penalty to the Secretary of State in the following amounts:

A. Ray S. Wells Corp., $500.

B. Plan West, $2,000.

C. Land Title, $2,000.

D. Natural Balance, $1,000.

4. The Committee violated Colo. Const. art. XXVIII, sec. 7 and Section 1-45-108(1)(a)(II), C.R.S. (2003) because it failed to disclose the occupation and employer of four individuals who contributed $100 or more. However, Colo. Const. art. XXVIII, sec. 10(1) provides for penalties only for those violations of Article 28 that relate to contribution or voluntary spending limits. Colo. Const. art. XXVIII, sec. 10(2)(a) provides that penalties for violations of reporting requirements under Article 28, Section 7 of the constitution or Section 108 of the FCPA must be assessed by the "appropriate officer". In this case the Douglas County clerk and recorder is the "appropriate officer" because that is the official with whom Sullivan and the Committee were required to file reports. Colo. Const. art. XXVIII, sec. 2(1); Section 1-45-109(1), C.R.S. (2003) Neither Article 28 nor the FCPA give an administrative law judge the authority to assess penalties for reporting or disclosure violations. Therefore, the Administrative Law Judge cannot assess a penalty for this violation.

5. In all other respects the complaint is dismissed.

DATED: May _____, 2004.

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MARSHALL A. SNIDER
Deputy Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **AGENCY DECISION** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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on this ___ day of May, 2004.

_____
Administrative Assistant

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